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NO. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

LAZAR T. WRACSARICHT, et al.,

Plaintiffs-Appellants,

V.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Petition for Writ of Certiorari From
The United States Court of Appeals for the
Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the tortious injury is neither readily apparent nor closely related to the alleged tortious conduct, does a claim under the Federal Torts Claim Act accrue immediately upon the tortious conduct or when the injury is discovered?

2. Was it proper for the Trial Court to grant Defendant's Motion for Dismissal upon an evidentiary hearing where the question is when Plaintiff's claim accrued under §2401 (b) of The Federal Torts Claim Act?

PARTIES

PLAINTIFFS

Lazar T. Wracsaricht, Hedviga Wracsaricht, Mladen Wracsaricht and Milena Wracsaricht.

DEFENDANTS

United States of America; State Department; Justice Department; Immigration and Naturalization Service; F. Ernest Ayers and "Jane Doe" Ayers, husband and wife; Richard Ahern and "Jane Doe" Ahern, husband and wife; David N. Ilchert and "Jane Doe" Ilchert, husband and wife; Edward Rudnick and "Jane Doe" Rudnick, husband and wife; K.E. Malmberg and "Jane Doe" Malmberg, husband and wife; John P. Boyd and "Jane Doe" Boyd, husband and wife; Murray Stein and "Jane Doe" Stein, husband and wife; Donald J. Simon and "Jane Doe" Simon, husband and wife; D.L. McClaran and "Jane Doe" McClaran, husband and wife; Stuart Shelby and "Jane Doe" Shelby, husband and wife; and L.F. Chapman, Jr. and "Jane Doe" Chapman, husband and wife.

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LOWER COURT OPINIONS

An order was issued by Judge Jack Tanner of the United States District Court for the Western District of Washington, at Tacoma, on February 5, 1981, dismissing Plaintiff's original Complaint, No. C80-480M.

The Ninth Circuit Court of Appeals affirmed the lower court opinion of dismissal in an unpublished memorandum, No. 81-3210, decided on July 8, 1982.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the Judgment decided and entered on July 8, 1982, by the United States Court of Appeals for the Ninth Circuit in Cause No. 81-3210.

28 USC §1254(1) provides that the Supreme Court may review Judgments entered by the Courts of Appeals upon issuance of a Writ of Certiorari.

STATUTE INVOLVED

28 USC §2401 Time for Commencing Action Against United States

...(b) A Tort Claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

STATEMENT OF THE CASE

This was a civil action in which the Plaintiffs alleged that the Defendants willfully, deliberately and negligently acted and conspired in excess of their authority and under color of law to deny the Plaintiffs their citizenship rights.

Plaintiff, Lazar T. Wracsaricht was born in Milwaukee, Wisconsin, on April 3, 1917. Four years later, Lazar returned with his parents to Yugoslavia where, with the exception of short trips to other European countries, he lived continuously until 1972. At no time during his absence from the United States did he commit any expatriating act nor did he ever renounce his U.S. citizenship.

In July, 1972, Plaintiff Lazar T. Wracsaricht applied at the United States Consulate in Bern, Switzerland for a United States passport. He was informed that an investigation would be necessary and would

be begun immediately. In the interim, the United States Consulate issued Lazar T. Wracsaricht a Business Visa to the United States based upon his Yugoslav passport. That Visa was to expire November 29, 1972, by which time Plaintiff, Lazar T. Wracsaricht felt sure that his passport application would have been approved.

Plaintiff Lazar T. Wracsaricht's purpose in coming to the United States on August 8, 1972, was to establish himself in a business venture in which he had invested near Olympia, Washington, and to secure suitable living accommodations for his family, the other Plaintiffs in this action, whom he expected to be joining him as soon as his passport was issued.

When Plaintiff, Lazar T. Wracsaricht had not received his passport by the middle of October, 1972, he retained a Washington,

D.C. attorney specializing in immigration and nationality law to represent him regarding the passport application. On November 29, 1972, however, Plaintiff Lazar T. Wracsaricht's non-immigrant business visa expired and he was advised at that time by the then Assistant Director for Travel Control of the Immigration and Naturalization Service that in order to prevent deportation, Plaintiff, Lazar T. Wracsaricht, should apply for permanent resident status. On December 27, 1972, Plaintiff, Lazar T. Wracsaricht applied for a change in his visa status and filed application for permanet resident status.

At a hearing held on March 12, 1973, on Plaintiff, Lazar T. Wracsaricht's permanent resident status application, Plaintiff, Lazar T. Wracsaricht was advised that his application for permanent resident status conflicted with his assertion of U.S. citizenship in his passport application. On

April 16, 1973, the Department of State informed Plaintiff, Lazar T. Wracsaricht, that due to the above-cited conflict, the State Department would give no further consideration to his passport application. Consequently, Plaintiff, Lazar T. Wracsaricht, withdrew his application for permanent resident status on April 26, 1973. Additionally, Plaintiff Lazar T. Wracsaricht requested a deportation hearing so that he could raise, and have a hearing on, the question of his citizenship. No deportation proceedings were ever held.

An official investigation into the status of Plaintiff Lazar T. Wracsaricht's citizenship began on May 15, 1973. The District Director of the Immigration and Naturalization Service, Seattle Office, sought information regarding Plaintiff's background from the State Department at that time, and was informed that such information was being

sought through the American Embassy in Yugoslavia.

While Plaintiff Lazar T. Wracsaricht was in the United States, setting up his new business and home, and seeking to establish his citizenship, Plaintiff Hedviga Wracsaricht, his wife, was living in Bern, Switzerland; their daughter, Plaintiff Milena Vracaric, was attending college in London, England; and their son, Plaintiff Mladen Wracsaricht, was attending school in Vacouver, British Columbia, Canada. On July 3, 1973, in an effort to reunite his family, Plaintiff Lazar T. Wrracsaricht applied as a United States citizen to the Immigration and Naturalization Service in Seattle for visa petitions to parole his family into the United States. Acting upon advice by the then District Director of the Immigration and Naturalization Service, that the process for admitting his family to visit him would be "easier" if

they all resided in Vancouver, B.C., Plaintiff Lazar T. Wracsaricht moved his family to that city.

Also in July of 1973, the United States State Department received a formal request from the government of Yugoslavia for Plaintiff Lazar T. Wracsaricht's extradition, based upon a conviction obtained in Yugoslavia in his absence. Plaintiff Lazar T. Wracsaricht was not informed at that time of the extradition request, and only learned of it several years later through indirect means.

On July 9, 1973 and August 24, 1973, Plaintiff Lazar T. Wracsaricht requested of the Immigration and Naturalization Service that his family, now all living in Vancouver, B.C., be allowed to visit him in the United States. Both requests were denied, without reasons stated for such denial.

The United States State Department provided the Immigration and Naturalization Ser-

vice with the background information it had received from Yugoslavia on November 21, 1973. Hearings were held by the Immigration and Naturalization Service in Seattle on December 20, 1973, and January 16, 1974 regarding Plaintiff Lazar T. Wracsaricht's application for permanent resident status for his family. In order to resolve that question, a determination of Plaintiff Lazar T. Wracsaricht's citizenship was necessary. On April 10, 1974, the findings were forwarded to the Immigration and Naturalization Service Central Office in Washington, D.C. Plaintiff Lazar T. Wracsaricht had no access to those findings at that time, and only several years later, in the early Summer of 1979, and through an indirect means, did he learn that the recommendation made was that Plaintiff Lazar T. Wracsaricht had not expatriated himself or lost his citizenship.

The Central office of the Immigration

and Naturalization Service requested additional information from the government of Yugoslavia through the State Department, on September 6, 1974. In that request, the Central Office indicated that it had insufficient information was to whether Plaintiff Lazar T. Wracsaricht had expatriated himself. Because of the now two year delay in a determination of his citizenship, and the now two year separation from his family, Plaintiff Lazar T. Wracsaricht filed a Petition for Judicial Determination of the United States Citizenship in the United States District Court for the Western District of Washington in August, 1974.

Additional information from the government of Yugoslavia via the United States State Department was received on February 26, 1975. On the basis of this "new information" received from Yugoslavia, the Immigration and Naturalization Service's Trial Attorney requested a new hearing. On April 18,

1975, the Trial Attorney issued new findings and a decision to the effect that Plaintiff Lazar T. Wracsaricht had, in fact, expatriated himself. The District Director of the Immigration and Naturalization Service denied Plaintiff Lazar T. Wracsaricht's visa petitions for parole of his family into the United States. On April 30, 1975, Plaintiff Lazar T. Wracsaricht appealed that finding to the Board of Immigration Appels. That Board, issuing its finding on August 27, 1975, denied Plaintiff Lazar T. Wracsaricht's petition to clarify the status of his alien relatives for the purposes of obtaining an Immigrant Visa. The Board failed, however, to resolve the issue of Plaintiff Lazar T. Wracsaricht's citizenship regarding possible expatriation.

The question of Plaintiff's citizenship was finally resolved by Judge Morrell Sharp of the United States District Court in the

case filed by Plaintiff Lazar T. Wracsaricht in August of 1974. Judge Sharp found that Plaintiff Lazar T. Wracsaricht was and at all times had been a United States citizen and that he had, in fact, not expatriated himself. The recommendation of the Immigration and Naturalization Service and the United States Attorney involved in the case was not to appeal Judge Sharp's finding. However, an appeal to the United States Court of Appeals was filed on May 5, 1976, at the insistence, as Plaintiffs were to learn several years later, by the United States State Department. The appeal was denied, however, and Judge Sharp's finding was affirmed. Wracsaricht v. U.S., Slip. Op. No. 76-1868 (9th Cir., Nov. 11, 1977) Thereafter, Plaintiff Lazar T. Wracsaricht spent considerable time re-uniting his family and settling into Olympia, Washington. The long delay in achieving said re-unification was simply attributed

to routine bureaucratic processing.

Later, in an effort to determine the cause for the nearly four year delay in the granting of his citizenship, Plaintiff Lazar T. Wracsaricht sought to obtain access to his file at the Immigration and Naturalization Service. When such access to his files, first at the Immigration and Naturalization Service and then later, at the State Department, was gained in the Summer of 1979, it was incredibly discovered that the Defendants in this case had been engaged in a game of international politics over the question of Plaintiff Lazar T. Wracsaricht's citizenship. During the process of Plaintiff's hearings on his passport application and the visa petitions, the government of Yugoslavia was requesting Plaintiff Lazar T. Wracsaricht's extradition. One of the pawns in this process was one Allen Scheffield, a United States citizen, who had skyjacked a plane

and landed in Yugoslavia, and was being held there. The government of Yugoslavia was willing to return Mr. Scheffield to the United States in return for Plaintiff Lazar T. Wracsaricht. In order to accomplish this, it would be necessary to rule that the Plaintiff, Lazar T. Wracsaricht was, in fact, not a United States citizen, for under the appropriate treaties, it was not possible to deport, based upon an extradition request, a United States citizen. The State Department files are replete with correspondence, memorandums, telegrams and other documents reflecting the State Department's efforts at blocking the Plaintiff's claim of United States citizenship.

Plaintiff then filed claims with each of the federal agencies involved, to-wit, the State Department on July 10, 1979, and the Justice Department on November 5, 1979. These claims were denied, respectively, on

November 19, 1979 and November 13, 1979. Plaintiff then brought this suit for monetary damages as a result of having to support a family in three different locations throughout the world, and for the severe emotional and psychological trauma resulting from the protracted family separation caused by the Defendants' activities. Jurisdiction was claimed under the Federal Torts Claim Act, 28 U.S.C. §1346(b), 2671 et. seq. and 42 U.S.C. 1983, 1985(3) and 1988, and the 4th and 5th Amendments to the United States Constitution. In the suit filed May 2, 1980, Plaintiffs alleged that the named Defendants willfully, deliberately and negligently acted and conspired to deny Plaintiffs of the citizenship rights.

Defendant United States filed a Motion to Dismiss the Complaint on July 8, 1980. Following the filing of an Amended Complaint and a Supplemental memorandum in Support of

Motion to Dismiss in early September, 1980, United States District Judge Jack E. Tanner, sitting at Tacoma, Washington, granted Defendants' Motion to Dismiss on November 20, 1980. Acting on its own Motion, the same Court on January 9, 1981, vacated the November 20th Order in light of Plaintiff's Amended Complaint. After further review of the Amended Complaint and the Motion to Dismiss, Judge Tanner issued an Order on February 5, 1981 having the following effect: (1) Dismissing all of the Plaintiffs' claims under 42 U.S.C. §§ 1983 and 1985(3) for failure to state a claim for which relief can be granted; (2) Dismissing all of the Plaintiffs' claims under 28 U.S.C. §§ 1346(b) and 2671 et. seq. for failure to submit timely claims.

Plaintiffs appealrd that part of Judge Tanner's Order which dismissed the Complaint under 28 U.S.C. §§1346(b) and 2671 et. seq. for failure to submit timely claims.

ARGUMENT FOR ALLOWANCE OF WRIT

Petitioner contends that the decision entered by the United States Court of Appeals for the Ninth Circuit regarding the application of the discovery of injury test to determinations of when a cause of action accrues in non-medical malpractice tort cases is contrary to the use of the same test in the Sixth and Seventh Circuits.

Ordinarily, a cause of action under the Federal Tort Claims Act will accrue on the date of injury. Zeidler v. U.S., 601 F.2d (527) (1979), and Steele v. U.S., 599 F.2d 823 (1979). Circumstances have arisen, however, where a claim accrues at a later time; for example, when the injured party is not aware that he has suffered an injury. Strict application of U.S.C. §2401(b) in the area o medical malpractice could produce harsh and unfair results.

> "It is well established that a tort claim against the government accrues for medical malpractice actions when the Claimant discovers or in the exercise of reasonable diligence should have discovered, the alleged malpractice."

Exnicious v. U.S., 563 F.2d 418, 420 (1977).

In Exnicious, supra, the Court applied the rationale that a Plaintiff in a malpractice suit should not be penalized for "blameless ignorance". The concept of "blameless ignorance" was first announced by the Supreme Court in Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L.Ed 1282 (1949).

In Urie, supra, a railroad fireman brought suit under the Federal Employers Liability Act, 45 U.S.C. §51 et. seq., claiming that he had contracted silicosis as a result of breathing silica dust for nearly thirty years. The pertinent statute of limitations provided that claims for compensation be filed within three years of accrual. Arguing that since

Plaintiff had been exposed to silica for so long, he must have unknowingly contracted the disease long before instituting suit, Defendants claimed that the suit was barred for untimely filing.

Rejecting that analysis the Supreme Court announced the precursor of the discovery rule:

> "If Urie were held barred from presecuting this action because he must be said. . .to have contracted silicosis (more than three years prior. . .), it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs: under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded upon his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability...We do not think the humane legislative plan intended such consequences to attach to blameless ignorance."

Urie, supra, 337 U.S. 163 at 169 and 170.

The Supreme Court set the rule regarding the accrual of medical malpractice claims by holding in U.S. v. Kubriek, 100 S.Ct. 352, 62 L.Ed. 2nd 259, 266 (1979), that a claim accrues when a plaintiff discovers or in the exercise of reasonable diligence, should discover the critical facts of injury and its cause. The reason for such an exception is essentially the same as for the general rule, i.e., a patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment. See Stoleson v. U.S., 629 F2d 1265, 1268 (1980). In Kubrick, the Court indicated that they remained:

> ". . .unconvinced that for statute of limitation purposes, a Plaintiff's ignorance of his legal rights and the ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the

> facts about causation may be in the control of the putative defendant, unavailable to the Plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who inflicted the injury."

Kubrick, supra, at Page 269.

Clearly, a potential plaintiff's cause of action in a medical malpractice case, accrues within the meaning of §2401(b) when he has knowledge of his injury and the relevant facts about causation.

The question of the applicability of the Kubrick rule to non-malpractice cases has been answered in Stoleson v. U.S., supra, and Liuzzo vs. U.S., 485 F.Supp. 1274 (1980). Stoleson concerned an ammunition factory worker who suffered anginal-type chest pains in 1968. Suspecting that the pain might be caused by her exposure to nitroglycerin on the job, Mrs. Stoleson diligently pursued the cause of these pains, consulting three

physicians. Upon learning, in 1971, that her condition was the result of said exposure to nitroglycerin, Mrs. Stoleson promptly filed an administrative claim. Judge Wood, waiting for the Seventh Circuit, noted in Stoleson that:

> "Only at this point did Mrs. Stoleson's suspicion ripen into knowledge of the missing critical fact -- causation. Despite or perhaps because of her diligence, this was the first point in time at which she could have pursued a claim against the government and therefore, under Kubrick, the moment at which the statute of limitations commenced to run."

Stoleson, supra, at Page 1271.

The Court found that to fix the time of accrual at any time prior to this would be to provide Mrs. Stoleson with only the delusive remedy prohibited by Urie. The Court concluded that:

> "Urie teaches that it is the nature of the problems faced by the plaintiff in discovering his injury and its cause, and

> not the occupation of the defendant, that governs the applicability of the discovery rule. . . We see no reason to ameliorate the harsh consequences of the statute of limitations in one category of cases to the exclusion of all others. Rather, any plaintiff who is blamelessly ignorant of the existence of cause of his injury shall be accorded the benefits of the discovery rule. . .As Urie demonstrates, the rule was not created in a medical malpractice contest and is not limited to such cases."

Stoleson, supra, at Page 1269.

Liuzzo, supra, arising in the Sixth Circuit, concerned a claim by the children of a civil rights worker slain in 1965. After investigating the testimony of an F.B.I. informant implicated in the killing, given before a Congressional committee investigating the F.B.I., this claim was filed against the F.B.I. and the United States. On the United States' Motion to Dismiss the suit for failure to state a timely claim, the District Court held that since the deceased's child-

ren had no reason to suspect that an investigation was warranted until 1975, the date upon which they received knowledge of possible F.B.I. involvement commenced the running of the statute. Refusing to apply §2401(b) mechanically, the Court found that:

> "The facts of this case amply demonstrate that plaintiffs had no reason to commence an investigation into governmental complicity in the mother's murder until 1975, when Rowe publicly testified regarding his violent activities as an F.B.I. informer. . . .Under the circumstances of this case, it would be both unfair and unrealistic to hold that plaintiffs should have investigated their claims earlier, for they had no cause to do so."

Liuzzo, supra, at Page 1283.

Holding that upon knowledge of the critical facts regarding an injury, a potential plaintiff's claim accrues, the Court concluded:

> "The Court is aware of no reason why harsh consequences should be avoided in one category of cases and yet mechanically imposed in another. Rather, the rationale of Kubrick is

> broad enought to warrant, indeed compel, its application to a non-malpractice case if the plaintiff in that case is ignorant of the critical facts concerning his injury."

Liuzzo, supra, at Page 1281.

The case at hand demonstrates a clear need for the application of the discovery rule. Upon the affirmance of the District Court's opinion regarding his citizenship status in 1976, Plaintiff Lazar T. Wracsaricht natrually concentrated upon the more pressing issue - reuniting the Wracsaricht family in the United States. During this process of relocation and settling in, the concern over the nearly four year delay in the determination of his status was pushed to the deeper recesses of Plaintiff Lazar T. Wracsarichts' mind. Only in the Summer of 1979, when he finally gained access to his Immigration and Naturalization Service and State Department files, was Plaintiff in posses-

sion of the critical facts of his injury, as described in Kubrick, supra, and Liuzzo, supra, causing the statute to begin running. Prior to this time, Plaintiff Lazar T. Wracsaricht had not considered himself injured. he simply assumed that he had been caught up in the bureaucratic morass - that the four years he spent in establishing his citizenship status was, unfortunately, routine delay.

The Immigration and Naturalization Service and the State Department files in Washington, D.C., provided the information necessary to meet the critical facts test of Kubrick: (1) That the Plaintiffs have been injured in that their separation was not the result of a routine bureaucratic process, but rather was the result of an intentional dalliance in the mysterious and sordid affairs of international politics, causing both unnecessary financial expenditures and emotional

and mental trauma due to the four year separation; (2) that the parties responsible for plaintiff's injury were the Immigration and Naturalization Service, the State Department and all of the named Defendants. The Court in Kubrick held that:

> "An injury may itself be latent, and facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."

Kubrick, supra, at Page 269.

The District Court's failure to apply the discovery rule of Stoleson and Liuzzo has produced the harsh and illogical consequences which the Court in Liuzzo sought to avoid. The burden placed upon the Defendant in this case is not undue, and will only occur in those cases where defendants have breached a pre-existing duty, such as here, to provide plaintiffs with the rights due a United States citizen. Had plaintiffs brought their action in either the Sixth or Seventh

Circuits, it seems clear that the merits of their claim would have been reached.

Plaintiff submits that the circumstances and questions present in this case are of such significance that the Supreme Court should resolve the conflict between the Circuits by granting this Petition and eventually establishing a uniform, national rule to be applied.

Respectfully submitted:

BUZZARD, GLENN, HENDERSON & MORRIS, P.S.

By: _____
JEROME L. BUZZARD
of Attorneys for Appellants